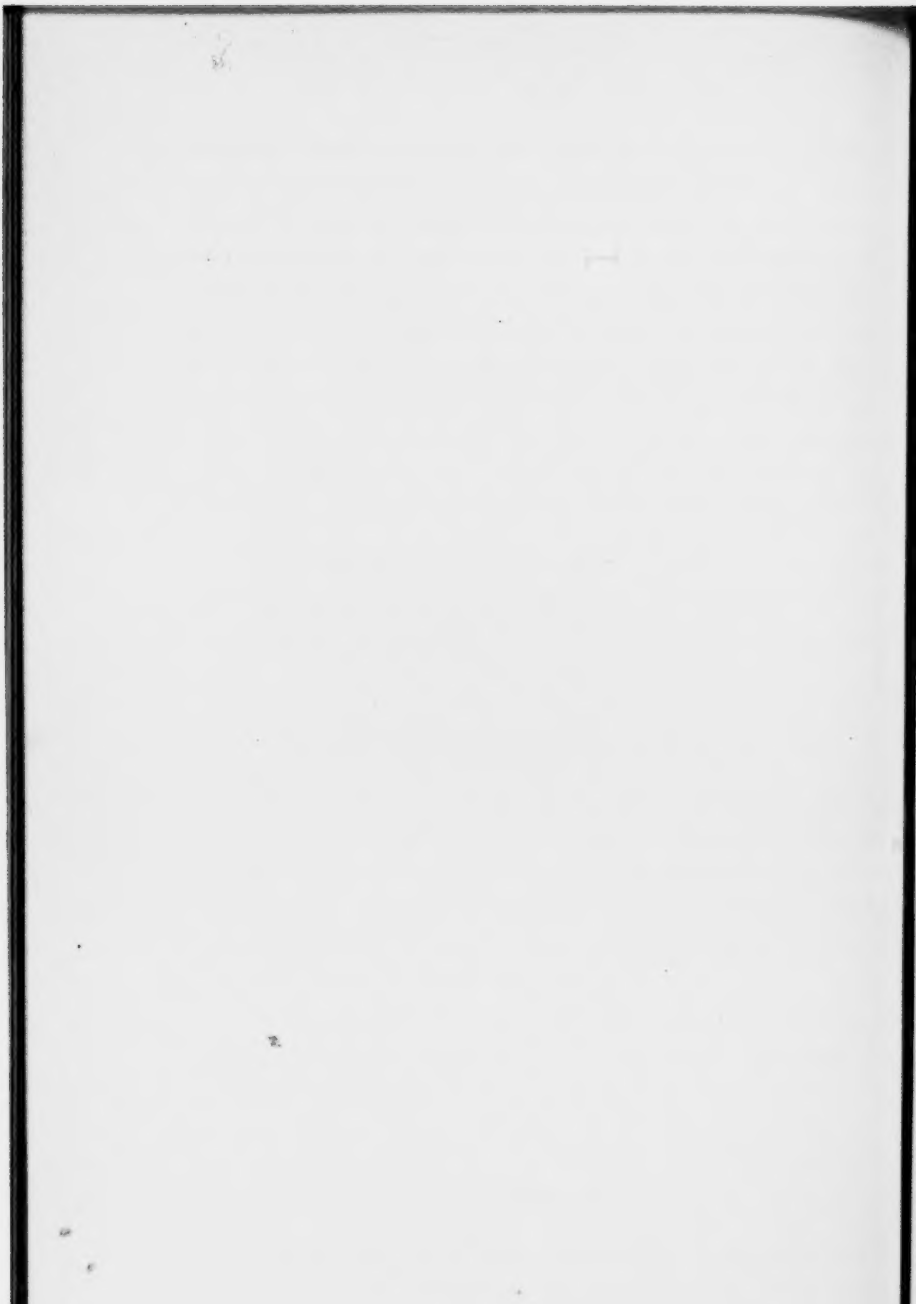

Supreme Court of the United States

OCTOBER TERM, 1943. No. .....

GRANT LUNCH CORPORATION,
Petitioner,

vs.

ALFRED E. DRISCOLL, Commissioner of the State Department of Alcoholic Beverage Control,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

A.

The Opinions of the Courts Below.

The opinion in the New Jersey Court of Errors and Appeals is reported in 130 N. J. L. 544. The opinion of the New Jersey Supreme Court is reported in 129 N. J. L. 408.

B.

Jurisdiction.

I.

The jurisdiction of this Court is sustained by Section 237 of the Judicial Code, as amended (28 U. S. C. A. §344b).

The reference in Section 237 to "a statute of any State" has been interpreted by this Court to include orders and

regulations of State commissions and agencies exercising delegated legislative authority.

Live Oak Water Users' Ass'n v. *Railroad Commission of State of California,* 269 U. S. 354 (1926);

Hamilton v. *Regents of University of California,* 293 U. S. 245 (1934).

II.

The date of the judgment to be reviewed is September 22, 1943.

III.

The New Jersey Court of Errors and Appeals, affirming the New Jersey Supreme Court, decided that the respondent had properly determined that Regulations No. 30 had been violated by petitioner, and that the regulations, so applied, did not violate due process of law guaranteed under the United States Constitution.

The jurisdiction of this Court is involved on the ground that, in so holding, the Court of Errors and Appeals decided a federal question of substance in a way not in accord with the applicable decisions of this court.

Statement of the Case.

The case has been stated under heading "Summary Statement of the Matter Involved" in the Petition for the Writ, page 1, and is not here repeated.

ARGUMENT.

The New Jersey "fair trade" act (L. 1935, c. 58, p. 140; R. S. 56: 4-5, Appendix A, p. 18, *infra*), after validating agreements between producers and retailers which establish resale prices for labeled products, provides that:

> "Willfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to the provisions of section one of this act, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby."

Subsequently, the New Jersey legislature delegated authority to the respondent to prohibit or regulate the sale of alcoholic beverages in violation of prices established under the "fair trade" act. This statute (L. 1938, c. 208, p. 492; Appendix B, p. 20, *infra*) provides that:

> "The State Commissioner of Alcoholic Beverage Control is hereby vested with the following powers to be exercised in such manner as will assist in properly supervising the liquor industry and promoting temperance: The commissioner may, in his discretion, by rule or regulation, prohibit or regulate the sale of alcoholic beverages within this State in violation of any fair trade contract entered into pursuant to the legislative sanction afforded by Revised Statutes, Title 56, chapter four."

Regulations No. 30 (Appendix C, p. 21, *infra*) establishes the mechanics for recording, with the State Department of Alcoholic Beverage Control, "fair trade" contracts

and prices governing the retail sale of alcoholic beverages. The section pertinent to the present inquiry is paragraph 6 which reads as follows:

> "Whenever any such contract and price list or altered contract or price list is filed and published as aforesaid, no retail licensee shall sell or offer for sale any product referred to therein except (a) at the price stipulated therein by the manufacturer or wholesalers; or (b) pursuant to and within the terms, conditions and limitations of a special permit first obtained from the Department of Alcoholic Beverage Control."

A.

Regulation No. 30 is a penal measure. Violation of the regulation is punishable by revocation or suspension of license. The five day suspension ordered in the instant case entails a loss for petitioner of approximately $2,500 (R., p. 21). An administrative regulation, thus enforceable, is unmistakably penal in character.

In *Marter* v. *Repp,* 80 N. J. L. 530 (Sup. Ct., 1910), aff'd 82 N. J. L. 531 (E. & A., 1911), a statute, governing the sale of alcoholic beverages, which imposed a similar forfeiture, was before the court. Justice Garrison said (at pp. 531, 532):

> "The statute is a police regulation, and the proceeding under review is one for the enforcement of a forfeiture, *i. e.,* a penalty for the violation of such police regulation. Such enforcement is solely in the interest of society, *i. e.,* the state, partly by ridding the public of an untrustworthy licensee and partly as a deterrent against like offenses. Compared with the penalties ordinarily visited upon like offenses, the penalty is enormous even from the pecuniary standpoint, to say nothing of the personal disability; for while a fine of so many dollars is not directly imposed, the forfeiture is of a license that may have

cost and be worth hundreds of dollars, to say nothing of the loss of rentals. I do not see by what test such legislation can be said to be not penal but civil. * * *."

"The definition of a penal statute given in the 22 Am. & Eng. Encycl. L. 654, is 'a penal statute, is one which enforces a forfeiture or penalty for transgressing its provisions or doing a thing prohibited'. That is precisely what this statute does, and the cases cited under the foregoing text justify the carefully-worded definition in this, viz, that 'penal' is a much broader term than 'criminal', and includes many statutory enforcements of police regulations, the violations of which are in no sense crimes. * * *."

Accord:

Small Co. v. *American Sugar Refining Co.*, 267 U. S. 233 (1925);

Schireson v. *State Board of Medical Examiners*, 130 N. J. L. 570 (E. & A., 1943);

Studerus Oil Co., Inc. v. *Jersey City*, 128 N. J. L. 286 (Sup. Ct., 1942).

B.

A penal measure, whose scope and intended application is not plainly defined, violates due process of law. The controlling principle is declared and illustrated in *Connally* v. *General Construction Co.*, 269 U. S. 385 (1925), in which Mr. Justice Sutherland, speaking for a unanimous court, stated, at page 391:

"That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And

> a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess as to its meaning and differ as to its application, violates the first essential of due process of law."

A more recent illustration of the governing principle will be found in *Lanzetta* v. *New Jersey,* 306 U. S. 451 (1939) in which the question was whether the so-called Ganster Act (R. S. 2:136-4) was repugnant to the due process clause of the Fourteenth Amendment in that it provided for punishment to be meted out to members of "gangs" without sufficiently defining that term. The Court of Errors and Appeals found that the expressions employed were sufficiently precise to sustain the enactment. *State* v. *Gaynor,* 119 N. J. L. 582 (1938). The United States Supreme Court held to the contrary. Mr. Justice Butler, speaking for a unanimous court, said at page 453:

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. See Stromberg *v.* California, 283 U. S. 359, 368, 75 L. ed. 1117, 1122, 51 S. Ct. 532, 73 A. L. R. 1484; Lovell *v.* Griffin, 303 U. S. 444, 82 L. ed. 949, 58 S. Ct. 666. No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids."

While it is true that this Court has held that a statute need not define its terms with that degree of precision found in a "chemist's or engineer's definition", it has nonetheless consistently held that there must be some guide sufficiently precise for an intelligent determination of the ultimate question of fact of whether there was a violation. *Sunshine Anthracite Coal Co.* v. *Adkins,* 310 U. S. 1940).

The fact that the action sought to be punished is morally reprehensible or even criminal under other statutes has no weight in determining whether the particular statute or regulation invoked satisfies due process of law. Thus, in *Pierce* v. *United States,* 314 U. S. 306 (1941), it appeared that the charge against the defendant was that he represented himself to be a T. V. A. official in violation of a statute which prohibited any person from falsely pretending to be an official or employee of the United States. A conviction followed and on appeal the question was whether T. V. A., a government owned corporation, was sufficiently identified with the government so that a representation of employment with such agency violated the statute. In reversing the conviction, Mr. Justice Reed, speaking for the court, said at page 310:

> "The statute in effect at the time of the commission of the alleged offenses did not speak of pretenses of acting under authority of corporations owned or controlled by the United States. It was passed in 1884 before the United States owned or controlled corporations operating hotels, boat lines and generating plants. The amendments, subsequent to the occasion fixed by the indictment, extended its scope first to the Home Owners' Loan Corporation, 49 Stat. 298, 12 U. S. C. A. §1467 (e), and later to all corporations owned or controlled by the United States, 52 Stat. 82. These legislative extensions of the scope of the act were in accord with the growing importance of the administrative corporation, *but a comparable judicial enlargement of a criminal act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.* Of Lanzetta *v.* New Jersey, 306 U. S. 451, 59 S. Ct. 618, 83 L. Ed. 888 and cases cited. While the act should be interpreted 'so as * * *

> to give full effect to its plain terms,' *Lamar* v. *United States*, 241 U. S. 103, 112, 36 S. Ct. 535, 538, 60 L. Ed. 912; *United States* v. *Barnow*, 239 U. S. 74, 36 S. Ct. 19, 60 L. Ed. 155, we should not depart from its words and context." (Italics added.)

There is nothing in Regulations No. 30 which expresses or implies an intention to punish sales below prices when made as a result of an honest mistake. The established construction, under state law, of similarly worded statutes is that they apply only to wilful and knowing violations. Thus, in *Cutter* v. *State*, 36 N. J. L. 125 (Sup. Ct., 1873), a Justice of the Peace who had been convicted of taking excessive fees appealed on the ground that he believed his charges conformed with the statute. In reversing the conviction, the court said at page 126:

> "On the part of the state it is argued that this statute is explicit in its terms, and makes the mere taking of an illegal fee a criminal act, without regard to the intent of the recipient. Such undoubtedly is the literal force of the language, but then, on the same principle, the officer would be guilty if he took by mistake or inadvertence, more than the sum coming to him. Nor would the statutory terms, if taken in their exact significance, exclude from their compass, an officer who might be laboring under an insane delusion. Manifestly therefore, the terms of this section are subject to certain practical limitations. This is the case with most statutes couched in comprehensive terms, and especially common law offences. In such instances the old and the new law are to be construed together; and the former will not be considered to be abolished except so far as the design to produce such effect appears to be clear. In morals, it is an evil mind which makes the offence, and this, as a general rule, has been at the root of criminal law. The consequence is that it is not to be intended that this prin-

ciple is discarded, merely on account of the generality of statutory language. It is highly reasonable to presume that the law makers did not intend to disgrace or to punish a person who should do an act under the belief that it was lawful to do it. And it is this presumption that fully justifies the statement of Mr. Bishop 'that a statute will not generally make an act criminal, however broad may be its language, unless the offender's intent concurred with his act.' Crim. Law, §80.

"This doctrine applies with full force to the present case. If the magistrate received the fees in question without any corrupt intent, and under the conviction that they were lawfully his due, I do not think such act was a crime by force of the statute above recited." (Italics added.)

There is nothing in the history and background of the adoption of Regulations No. 30 to support, or even suggest a different interpretation. The basis for the regulation is the New Jersey Fair Trade Act. The Illinois version of the same statute came before this Court in *Old Dearborn Distributing Co.* v. *Seagram-Distillers Corp.*, 299 U. S. 183 (1936). In describing the statute, Mr. Justice Sutherland specially emphasized its restricted application.

> "It is first to be noted that §2 reaches not the *mere* advertising, offering for sale or selling at less than the stipulated price, but the doing of any of these things *wilfully and knowingly*". (Italics copied). 299 U. S. at 193.

This analysis is confirmed by the preambles which declared the objectives of the Fair Trade Act and of the statute under which Regulations No. 30 were promulgated. The common aim was to eliminate indiscriminate price cutting with resultant damage to trade marks and other prop-

erty rights. By hypothesis an unintended or mistaken sale below price is an isolated occurrence and not indiscriminate price cutting. It is easily and quickly corrected, and injures no one. In view of the history and development of the matter, the omission to specify in Regulations No. 30 that it was intended to apply to all sales, regardless of knowledge of motive or intent, is especially significant. As in the *Lanzetta* case, *supra*, p. 12, it may be that the state court's interpretation of the regulation and the scope which it comprehends is not reviewable in this Court. However, again as in the *Lanzetta* case, a judicial interpretation of the statute by the state court however precise and authoritative it may be, cannot supply a deficiency of explanation in the statute itself when the protection of the due process clause is invoked.

The history of Regulations 30, the provisions, object and judicial construction of the statutes from which it derives, and finally the language which it employs is negative and excludes its application to unintended or mistaken sales below price. It follows that the application of a regulation, so worded and derived, to support the punishment of a sale admittedly made without fault and as a result of an honest mistake, violates due process of law.

C.

Administrative regulations, like statutes, have the force and effect of law. Unlike statutes, however, administrative agencies may adopt, revise or rescind regulations easily, quickly and without formality; interested persons need not be notified and heard; and no official medium need be provided to give publicity to the regulation. If statutes, which employ vague or uncertain language, violate due process of law, that error is compounded many times when it occurs in an administrative regulation. The advantage of facility of

action which an administrative agency enjoys over a legislature surely imposes a corresponding obligation to write regulations which define their scope and application with certainty and precision. In *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80 (1943), a determination of the Commission was reversed not because the action taken exceeded the Commission's power, but rather because the grounds advanced by the Commission could not sustain its order. The respondent Commissioner may have authority to prohibit, and thereafter to punish, any sale below price, regardless of knowledge or intent. It is submitted, however, that the imposition of sanctions must follow and not precede the issuance of an adequate regulation. The present form of Regulations No. 30 does not support its application to a sale made without deliberation and as a result of an honest mistake and, when invoked in such a case to justify a forfeiture of license, deprives the licensee of property without due process of law. *Lanzetta* v. *New Jersey*, 306 U. S. 451 (1939).

Respectfully submitted,

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